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No. 92-1466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRAXSTON LEE BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Most of the NCAA's opposition is devoted to trying to establish that petitioner's complaint was not dismissed because there is an antitrust immunity for eligibility rules or because the members of the NCAA are immune from antitrust suits brought by student athletes. Instead, according to the NCAA, petitioner's downfall was his failure to allege

an antitrust injury, despite the fact that the NCAA and the lower courts had given him every reasonable opportunity to cure the defect.

But this Court will search the opposition in vain to find out what kind of injury *would* have sufficed to meet the requirements of the antitrust laws, just as it will not find that answer in the opinion of the majority below. The reason is that, under the NCAA's theory, there is no credible antitrust injury that any student athlete could allege. Indeed, the allegations of injury made in the complaint and repeated both in the NCAA's Opposition (4-5) and the opinion of the majority (13a-14a) cover all possible injuries that any person in petitioner's position could reasonably have alleged. The NCAA underscores this by conceding that the allegations would be sufficient to allege a *per se* violation of the antitrust laws. Opposition at 14. Thus, while the NCAA implies that others might succeed where petitioner has failed, if they could allege a proper antitrust injury, its argument, and the decision below, preclude *any* student athlete from bringing an antitrust claim, and effectively immunize the NCAA and its eligibility rules from antitrust scrutiny.

Any doubt about this is dispelled by the NCAA's insistence that petitioner cannot allege an antitrust injury because it is only injury to competition, not to a competitor, that is covered by the Sherman Act, Opposition at 12, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The principal difficulty with that contention -- aside from the fact that the NCAA is relying on a case involving allegedly unfair competition between competitors, whereas this case involves a horizontal agreement among competitors -- is the narrow manner in which the NCAA interprets "competition." Under the NCAA's reinterpretation of these precedents horizontal agreements to fix the terms upon which employers compete for employees cannot be challenged based on the injury to those who are the targets of such agreements. Thus, according to the NCAA, workers

victimized by a price fixing agreement among all employers cannot sue under the antitrust laws *unless* there is an injury to someone else besides the workers, such as to "a rival upstart league" in *Radovich v. National Football League*, 352 U.S. 445 (1957), or by "*impairing the supply* of encyclopedias *to the public*" in *Nichols v. Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) Opposition at 15 (emphasis in original). Here, petitioner did allege a possible injury to the NFL, but did not allege any injury to any other "rival" to the NCAA because it is the dominant organization for college athletes and has no competitors.

Under the NCAA's strained interpretation of *Nichols*, perhaps the petitioner could have alleged injury to football fans as the ultimate "consuming public" for whom the antitrust laws are intended. Assuming that loss of enjoyment from not having a particular player on a team for which a given fan roots is cognizable injury under the antitrust laws, it would be extremely difficult to prove who is injured, or that one fan's loss is not another's gain. But more fundamentally, does the NCAA really mean that direct monetary losses suffered by the student athletes are outside the scope of the antitrust laws, but that emotional injuries to fans are within them?

In petitioner's view, the NCAA's Opposition and the ruling of the majority below are nothing more than a smokescreen for the real bottom line: student athletes can never mount an antitrust challenge to the NCAA's eligibility rules, no matter how seriously the rules affect their careers and finances, because those kinds of injuries are not within the antitrust laws. And they maintain that position despite this Court's ruling in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), in which members of the NCAA were allowed to sue the NCAA under the same antitrust laws relied on here,

over NCAA rules that had the same limiting effects on competition among NCAA schools as those at issue here. The sole difference in the two cases is that the victims here are student athletes, who had no role in the issuing of the rules, whereas the "victims" in *Board of Regents* were NCAA members who did not like the results that their fellow members had approved.

Even in its response to petitioner's argument that the lower courts improperly weighed the allegedly pro-competitive effects of the no-draft and no-agent rules against their anticompetitive effects, the NCAA returns to the same "no antitrust injury" refrain. Its principal argument is not that such weighing is proper on a motion to dismiss in a rule of reason case, but that no such weighing is required where, as here, the plaintiff failed "to allege an anticompetitive effect *at all*." Opposition at 17 (emphasis in original). Thus the NCAA impliedly concedes that, if the lower courts engaged in such a process on a motion to dismiss, it was error to do so, and is left to defend the judgment below on the ground that a horizontal agreement among NCAA member schools, when characterized as an eligibility rule, is not within the purview of the antitrust laws, at least when challenged by a student athlete. Whether characterized as an exclusion, or an immunity, or a limitation on antitrust coverage, that result is inconsistent with opinions of this Court and the entire thrust of the antitrust laws, which are designed to protect victims of the very type of horizontal agreements at issue here. Accordingly, review is warranted to prevent the creation of a major hole in the laws that this Court has described as the "Magna Carta of free enterprise," *United States v. Topco Associates*, Inc., 405 U.S. 596, 610 (1972).

CONCLUSION

For the foregoing reasons and those previously stated, certiorari should be granted.

Respectfully submitted.

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